APPELLANT PRO SE:

RAYMOND C. BOWYER
Walton, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RAYMOND C. BOWYER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-0703-CR-254
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard A. Maughmer, Judge
Cause No. 09D02-0607-MC-5

December 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Raymond Bowyer was found in direct contempt of court for failing to appear for a scheduled hearing and for filing pleadings characterized by the contempt information as accusing a judge of "making inappropriate comments, unprofessionalism, malfeasance, misfeasance, destruction of evidence, and impropriety." (App. at 7.)

We reverse.

FACTS AND PROCEDURAL HISTORY

In June and July of 2006, Bowyer moved for the recusal of Cass Superior Court Judge Richard Maughmer. He offered a number of exhibits to show Judge Maughmer had "personal animus, bias and prejudice" against Bowyer. (Br. of Appellant at 6.) Bowyer included documents critical of Judge Maughmer's performance when he was prosecutor. Bowyer had run against Judge Maughmer in the primary election for prosecutor.

In July of 2006 the court issued an information alleging direct criminal contempt of court and ordering Bowyer to appear and show cause why he should not be held in contempt. The hearing was continued to October of 2006, and Bowyer did not appear. The court issued a bench warrant for his arrest. Bowyer subsequently appeared with counsel, a hearing was held, and the trial court found him guilty of contempt and failure to appear at the October hearing.

DISCUSSION AND DECISION

The State filed a Waiver of Brief of Appellee, which we accepted. When an appellee does not submit an answer brief we need not undertake the burden of developing an argument on the appellee's behalf. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065,

1068 (Ind. 2006). Rather, we will reverse the trial court's judgment if the appellant's brief presents *prima facie* error. *Id*. *Prima facie* error in this context is defined as "at first sight, on first appearance, or on the face of it." *Id*. If the appellant cannot meet this burden, we will affirm.

Whether a party is in contempt of court is left to the discretion of the trial court. *City of Gary v. Major*, 822 N.E.2d 165, 171 (Ind. 2005). We will reverse a finding of contempt only if there is no evidence or inference therefrom to support it. *Id*.

There are two types of contempt, direct and indirect. Direct contempt is conduct directly interfering with court proceedings while court is in session, including creation of noise or confusion, disrespectful conduct and refusal to take the witness stand. *Curtis v. State*, 625 N.E.2d 496, 497 (Ind. Ct. App. 1993). Such conduct must generally take place in or immediately adjacent to the courtroom and while court is in session, so that the judge has personal knowledge of such conduct in his official capacity. *Id*.; Ind. Code § 34-47-2-1.[1] Direct contempt is limited to those situations where the conduct creates an open threat to the orderly procedure of the court and such a flagrant defiance of the judge before the public that, if not instantly suppressed and punished, will result in demoralization of the court's authority. *Curtis*, 625 N.E.2d at 497.

[1] Ind. Code § 34-47-2-1 provides:

(a) Every person who disturbs the business and proceedings of a court:
(1) by creating any noise or confusion;
(2) in a court of record; and
(3) while the court is open for and engaged in the transaction of business;
is considered guilty of a direct contempt of court.

(b) This section applies to a disturbance caused:
(1) by the commission of a felony, a misdemeanor, or an other unlawful act;
(2) by talking, moving about, or by signs, or gestures; or
(3) in any other manner.

In all other situations, due process of law requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. *Id.*

Bowyer asserts the finding he was in direct contempt was improper because the charging information did not allege acts that amount to direct contempt. We agree.[2] The charging information for "CONTEMPT OF COURT (DIRECT-CRIMINAL)," (App. at 7), alleges Bowyer's pleadings accused Judge Maughmer of "making inappropriate comments, unprofessionalism, malfeasance, misfeasance, destruction of evidence, and impropriety." (*Id.*) The information alleged the filing of the pleadings disrupted the operation of the court by "wasting the court's time causing research and additional pleadings to appropriately deal with Mr. Bowyer's actions." (*Id.*)

Direct contempt generally means conduct directly interfering with court proceedings while court is in session, and such conduct must take place in or immediately adjacent to the courtroom and while court is in session. *La Grange v. State*, 238 Ind. 689, 694, 153 N.E.2d 593, 596 (Ind. 1958). Bowyer's allegedly directly contemptuous acts did not interfere with court proceedings while the court was in session, nor did it take place in or immediately adjacent to the courtroom and while the court was in session.

[2] We accordingly need not address Bowyer's alternative argument he could not be held in direct contempt because his statements on which the contempt charge was premised were privileged. As Bowyer was not charged with indirect contempt, we need not address his arguments.

However, under the inherent power theory, that definition of contempt does not exclude other acts or conduct. For example, contemptuous statements in pleadings or official reports filed in court but not read in open court have also been held direct contempt as analogous to oral statements made in open court. *Id.* The record reflects Bowyer's allegedly contemptuous documents were not introduced into evidence in the contempt proceedings, nor were they specifically alluded to in that proceeding. Therefore, we are unable to determine whether the pleadings might have been contemptuous under the inherent power theory. We must accordingly find Bowyer has established *prima facie* error in the judgment he was in direct contempt.[3]

We must accordingly reverse the contempt order.

Reversed.

CRONE, J., and DARDEN, J., concur.

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[3] The Judgment of Conviction was for direct criminal contempt of court, but was premised on Bowyer's failure to appear as well as the pleadings addressed above. Bowyer's failure to appear could not have been direct contempt.

The issue in *Curtis* was whether an attorney's failure to appear for a scheduled trial date was direct or indirect contempt. In such a circumstance, the court asks the attorney who failed to appear for an explanation. If the explanation is adequate, there is no contempt. If the attorney refuses to give an explanation, or offers an insulting, frivolous, or clearly inadequate explanation, both the attorney's absence and his or her lack of an adequate reason for the absence occurs in the presence of the court, and the attorney may be cited for direct contempt. 625 N.E.2d at 498. If the explanation does not fall into one of the above categories, that is, if there is some evidence of the adequacy of the explanation, the matter should be treated as an indirect contempt. *Id.*

Curtis was not given the opportunity to explain his absence to the court before he was found in contempt, but he explained in his verified petition to reconsider that the trial in question had not appeared on the court's calendar. That explanation was not "clearly inadequate on its face," therefore, the trial court erred in finding Curtis in direct contempt. *Id.* Bowyer told the court he had been in Indianapolis "for purposes of litigation" on the day he failed to appear, and he was unable to get back to Cass County in time. (App. at 492.) We cannot say that explanation was "clearly inadequate on its face"; therefore, Boyer's contempt could not have been direct contempt. We accordingly need not address Bowyer's argument he was not in contempt for failure to appear.